Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

JANETTE M. LOHMAN, et al.,

Petitioners,

v.

EVELYN SUSAN HAFLEY,

Respondent.

Petition for Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case arises against the backdrop of an ever-increasing number of section 1983 cases brought against Missouri officials, particularly cabinet-level officers such as two petitioners here. Because the Eighth Circuit Court of Appeals has applied qualified immunity in a haphazard manner, these state officials are often denied the intended benefits of qualified immunity and required to engage in discovery and other pre-trial proceedings greatly disrupting the performance of their official duties. The question presented is:

Is a circuit court reviewing the denial of a motion to dismiss asserting an entitlement to qualified immunity required to employ a heightened pleading standard, i.e., a standard that requires the plaintiff to plead specific, nonconclusory facts that would allow the court to perform a fact-based qualified immunity analysis?

LIST OF PARTIES

The defendants-appellants in the proceedings below were the petitioners Janette Lohman, Director, Department of Revenue; James Callis, Deputy Director; Dean Powell, formerly, Assistant Administrator, Field Services Bureau; Richard Lamb, Administrator, Field Services Bureau; Raymond Hune, Director, Division of Motor Vehicles; William Siedhoff, formerly, Director, Division of Motor Vehicle and Driver's Licensing; Mary Ann Reuter, formerly, Field Services Bureau, Manager; Lynn Bexten, Personnel Officer; Zoe Lyle, formerly, Deputy Division Director, Motor Vehicle and Driver's Licensing; Ellie James, formerly, Administrator, Field Services Bureau; and William H. Melcher, formerly, Deputy Director and Acting Director. Respondent Evelyn Susan Hafley, an administrative assistant within the Field Services Bureau of the Missouri Department of Revenue, was the plaintiff-appellant below.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Lohman, Callis, Powell, Lamb, Hune, Siedhoff, Reuter, Bexten, Lyle, James, and Melcher respectfully pray that the court issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit in *Evelyn Susan Hafley v. Janette M. Lohman, et al.*, No. 95-3405 (July 19, 1996).

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 90 F.3d 264 and reprinted in the Appendix ("App") at A-2. The district court's orders denying the motion to dismiss and the motion for reconsideration are both unreported and are reprinted in the Appendix at A-10 and A-9 respectively.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. § § 1331, 1343 (4) and 42 U.S.C. § 1983, the respondent brought this suit in the United States District Court for the Western District of Missouri. On August 7, 1995, the district court denied petitioners' motion to dismiss. App. at A-10. Because the earlier order did not explicitly deny qualified immunity, petitioners filed a motion for reconsideration, which was denied on September 7, 1995. App. at A-9.

Petitioners appealed from the denial of their motion to dismiss, invoking the jurisdiction of the appellate court under

28 U.S.C. § 1291 and the collateral order doctrine. On July 19, 1996, the United States Court of Appeals for the Eighth Circuit affirmed the denial of petitioners' motion to dismiss asserting qualified immunity. App. at A-2. Petitioner's combined petition for rehearing and suggestions for rehearing en banc was denied on September 3, 1996. App. at A-1.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves parts of the First Amendment to the Constitution of the United States, 42 U.S.C. § 1983 and Mo. Rev. Stat. § 32.057.1 (1994). These provisions are reprinted in the Appendix beginning at A-20.

STATEMENT OF THE CASE

The respondent, a clerical employee amongst the two thousand employees of the Missouri Department of Revenue, has brought suit against eleven current and former Department officials generally alleging that they acted in concert to violate her right to freedom of expression in the work place. The petitioners, including the current and former cabinet-level directors of the Department and their immediate deputies, consist of two teams of supervisory employees from the current and former administrations of the Department. Seven of the eleven petitioners, including the current and former cabinet-level directors and their immediate deputies, are not linked in the complaint to any specific allegedly unconstitutional act. Rather, their names along with those of three other petitioners are entirely omitted from the substantive allegations of the complaint. The complaint is reprinted in its entirety in the Appendix at A-11 through A-19.

The only allegation as to petitioner James is that she has violated respondent's first amendment rights by instructing respondent to (1) "hide a file containing information about the Department['s]. . . fee office" from undisclosed individuals, and (2) to "say nothing about the file." Respondent allegedly declined, asserting that these instructions were unlawful. Respondent reported these instructions to petitioner Powell who allegedly violated respondent's constitutional rights by telling her to follow her supervisor's instructions and "stay out of it." App. at A-15. There is no allegation that at the time of these instructions petitioners were under any legal duty to disclose the existence or contents of the file. The remaining two petitioners, Lamb and Reuter, are only alleged to have violated respondent's rights by having been "advised" of information. App. at A-

15. It is alleged that the file was later seized as part of a criminal investigation and that petitioners, as a group, retaliated against respondent for her refusal to follow the allegedly "illegal" instructions. The complaint fails to link any petitioner with any specific act of retaliation and never discloses the basis for respondent's claim that James' instructions were illegal.

Given the sparseness of these allegations, petitioners filed a motion to dismiss asserting qualified immunity and requesting the district court to impose a heightened pleading standard on respondent's allegations. The district court initially denied the motion without mentioning qualified immunity. App. at A-10. Upon motion for reconsideration, the district court denied petitioner's claim of qualified immunity, finding "insufficient evidence . . . to weigh the applicability of defendants' assertion of qualified immunity," and noting that petitioners had been put on "notice" of respondent's complaint. App. at A-9.

On appeal the Eighth Circuit acknowledged that a heightened pleading standard is applicable when governmental officials assert qualified immunity (App. at A-5 through A-6) and that its review of the denial of a motion to dismiss asserting qualified immunity was *de novo*. App. at A-5. Nevertheless, the court refused to apply the heightened pleading standard applicable in the Eighth Circuit to its review of the complaint. App. at A-6. Rather, the court found that while it had jurisdiction to review the denial of qualified immunity, it lacked jurisdiction to review the factual sufficiency of respondent's allegations because the denial of the motion to dismiss asserting qualified immunity was not a final appealable order. App. at A-6. The petition for rehearing or rehearing en banc was denied. App. at A-1.

REASONS FOR GRANTING THE WRIT

This Court has indicated that qualified immunity protects important societal interests, preventing the diversion of officials and resources from the public's business and assuring that qualified individuals will neither be deterred from government service nor deterred from doing their duty during their tenure. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-07 (1982). The petition in this case should be granted because the decision of the Eighth Circuit, failing to effectuate qualified immunity, conflicts with the decisions of the Sixth, Ninth and Eleventh Circuits and is inconsistent with the holdings of this Court and additional circuit courts. In fact, the opinions of the circuit courts concerning the applicability of a heightened pleading standard are entirely inconsistent causing great confusion for governmental officials and the district courts. The district and circuit courts of this nation are regularly called upon to apply the doctrine of qualified immunity to prevent specious claims against government officials from interrupting important government operations. They do so in the absence of clear standards, producing inconsistent applications of qualified immunity and, thereby, further increasing the amount of § 1983 litigation.

As it now stands a cabinet officer subject to suit in the Eighth Circuit enjoys significantly less qualified immunity protection than a cabinet officer in the Sixth, Ninth and Eleventh Circuits. Conceivably, a cabinet officer performing an act in these circuits would be entitled to dismissal of a complaint while a cabinet officer in the Eighth Circuit performing the same act would be forced to engage in discovery and otherwise litigate the case. Federal officials would seem to be at particular risk. They could literally perform the same act in all four circuits and be entitled to dismissal in all but the Eighth Circuit. The result of a

qualified immunity analysis should not be dependent on the geographic location of the court performing it because the protections afforded by qualified immunity are equally compelling throughout the nation.

A. There is a conflict in the circuits concerning the existence of a heightened pleading standard in qualified immunity cases, an important federal issue left open by this Court.

1. Importance of Qualified Immunity. This Court has articulated the purpose of qualified immunity and its importance. As observed in *Harlow v. Fitzgerald,* 457 U.S. 800, 806-07 (1982), the protections of qualified immunity do not exist for the purpose of protecting the individuals that hold public office. Rather, qualified immunity protects society from certain costs it cannot realistically incur:

> These social costs include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'

Id. at 814. These societal interests of the highest order are not vindicated by providing only cursory review to an assertion of qualified immunity. A cursory review is all a court can offer in the presence of inadequate factual allegations.

2. Circuit Court Conflict Regarding Application of Heightened Pleading Standard Upon Appellate Review of Motion to Dismiss Asserting Qualified Immunity. In *Leatherman v. Tarrant Co. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 166-67 (1993), this Court reserved for another day the propriety of applying a heightened pleading standard to allegations made against governmental officials who enjoy qualified immunity. The vast majority of the circuit courts impose some form of a heightened pleading standard[1], but the application of the doctrine to governmental officials asserting qualified immunity in a motion to dismiss varies widely. The Eighth Circuit refuses to apply the heightened pleading standard, which it imposes on its district courts, to its review of a motion to dismiss asserting qualified immunity despite the acknowledged *de novo* nature of that review. This conflicts with the decisions of at least three other circuits. In fact, the Sixth Circuit has been rather emphatic in its conclusion that the heightened pleading standard must be employed upon the review of the denial of a motion to dismiss asserting qualified immunity.

In *Veney v. Hogan*, 70 F.3d 917 (6th Cir. 1996), the Sixth Circuit reversed the denial of a motion to dismiss asserting qualified immunity. Like Hafley in the present case, Veney brought a § 1983 suit alleging that his superiors had retaliated against him in the context of his government employment for expressions protected by the First Amendment, including the filing of employee grievances and the reporting of misdeeds done by others. There is more factual specificity in Veney's claims than in Hafley's. The district court denied the motion to dismiss, like the district court here, finding that the notice pleading standards of

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[1] The cases are collected in *Crawford-El v. Britton*, 93 F.3d 813, 851 n.7 (D.C. Cir. 1996) (en banc), Edwards, J., concurring in judgment.

Fed.R.Civ.P. 8(a) sufficed despite the assertion of qualified immunity.

The Sixth Circuit disagreed, reiterated its historical views[2] and reversed the denial of the motion to dismiss. In criticism equally applicable to Hafley's complaint, the Sixth Circuit described the pleading as one that failed to "indicate the precise content and form of the complaints....., the context in which they were made, and when and to whom they were made.... [T]he complaint does not allege wrongdoing by any particular defendant." *Veney*, 70 F.3d at 922. The court indicated that a plaintiff pleading his complaint in such a "notice" format is required to respond to the defense of qualified immunity asserted through a motion to dismiss. *Id.* If the plaintiff's original complaint is deficient "he must amend his complaint to include the specific, non-conclusory allegations of fact that will enable the district court to determine that those facts, if proved, will overcome the defense of qualified immunity." *Id.*[3] The Sixth Circuit

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[2] The Sixth Circuit had clearly forecast its view on the sufficiency of pleading necessary to overcome a defense of qualified immunity. *See Guercio v. Brody*, 911 F.2d 1179, 1187-89 (6th Cir. 1990) (applying *Pickering v. Board of Ed.*, 391 U.S. 563 (1968) to the nonconclusory allegations in the complaint and reversing the denial of defendants' motion to dismiss asserting qualified immunity). *See also Cameron v. Seitz*, 38 F.3d 264, 273 n.2 (6th Cir. 1994) ("a civil rights plaintiff should include in his original complaint all factual allegations necessary to sustain a conclusion that the defendant violated clearly established law"; if he fails he can replead); *Dominique v. Telb*, 831 F.2d 673, 676 (6th Cir. 1987) (same).

[3] This conclusion is not inconsistent with this Court's holding in *Gomez v. Toledo*, 446 U.S. 635, 640 (1980), that a plaintiff is not under an obligation to anticipate the defense of qualified immunity and plead around it. Rather the Sixth Circuit's heightened pleading requirement is consistent with this Court's precedent. See *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("[u]nless the plaintiff's allegations state a claim of

chastised the district court's decision to employ a "notice" pleading standard:

> [The] failure to impose such a burden [the heightened pleading standard] at the pleading stage would eviscerate the substantive rights afforded by the qualified immunity defense. The promise of an early exit from a lawsuit offered by qualified immunity is an empty promise if plaintiffs are routinely permitted to survive a motion to dismiss with mere "notice" pleading. *Id.*

Unfortunately, an empty promise is all the protection qualified immunity provides to governmental officials in the Eighth Circuit who present a claim of immunity in a motion to dismiss. Cabinet-level officers in Missouri, their immediate deputies and everyone between them in the chain of command, all the way to the clerical-employee plaintiff, are required by the Eighth Circuit's opinion to participate in this case and are thus denied a meaningful opportunity for an early exit from the lawsuit. The decision of the Eighth Circuit, both in reasoning and result, is directly contrary to that of the Sixth Circuit in *Veney* and it ignores this Court's recent admonition that qualified immunity "is meant to give government officials a right, not merely to 'avoid standing trial,' but also avoid the burdens of 'such pretrial matters as discovery.'" *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 839 (1996), *quoting Mitchell*, 472 U.S. at 526.

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violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal . . ."). See also *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 2156 (1995) ("the appealable issue is purely a legal one: whether the facts alleged . . . support a claim of violation of clearly established law"), quoting, *Mitchell*, 472 U.S. at 528 n.9.

The Eighth Circuit's decision is in direct conflict with the decisions of the Sixth Circuit. The Eighth Circuit refuses to impose a heightened pleading standard, requiring a plaintiff to plead specific, nonconclusory allegations of fact with which the defense of qualified immunity can be evaluated, while the Sixth Circuit imposes the standard. The Eighth Circuit permits a plaintiff to proceed against seven defendants despite the absence of specific allegations of unconstitutional conduct while the Sixth Circuit rejects such a complaint. The Eighth Circuit purports to perform a *Pickering v. Board of Educ.*, 391 U.S. 563 (1968), balancing test employing the vague allegations in the complaint while the Sixth Circuit only places well-pleaded, nonconclusory allegations on the *Pickering* scale.[4] The decisions of the Eighth and the Sixth Circuits conflict in every significant aspect.

The Sixth Circuit does not stand alone in imposing a heightened pleading standard when reviewing the denial of a motion to dismiss asserting qualified immunity. In *Olandeinde v. City of Birmingham*, 963 F.2d 1481 (11th Cir. 1992), the Eleventh Circuit considered the denial of such a motion. In that case, police officers brought a claim against the mayor and other officials alleging that they had retaliated against the police officers for exercising their freedom of expression. The mayor moved to dismiss, asserting that the

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[4] In order to perform a *Pickering* balancing test in the context of a motion to dismiss asserting qualified immunity, the court must "place the totality of the well-pleaded, non-conclusory allegations of the complaint on the *Pickering* scale to balance a public employee's interest in commenting on matters of public concern against the employer's interest in promoting the efficiency of the public services it performs through its employees . . . . [The] court must dispose of the motion to dismiss . . . by determining whether [plaintiff's] rights under *Pickering* . . . were so clear at the time in question that reasonable minds could not differ on the constitutionality of [the employment action]." *Guercio*, 911 F.2d at 1183-84, internal citations and quotations omitted.

allegations in the complaint were inadequate to overcome his qualified immunity. The district court denied the motion.

On appeal the Eleventh Circuit reversed. It noted that to protect public officials from the burdens of litigation over specious claims, "we, and other circuits, have tightened the application of Rule 8 to § 1983 cases." *Olandeinde*, 963 F.2d at 1485. The court noted that in pleading a § 1983 case additional detail is necessary to enable the court to see if the allegedly violated right was clearly established when the official acted. *Id.* The complaint the Eleventh Circuit considered, similar to Hafley's complaint here (App. at A-16, ¶ 15), generally alleged that the mayor along with other defendants took actions to punish and harass the plaintiff and that they all conspired to violate plaintiffs' rights. *Id.* at 1487. Conducting its *de novo* review, the court criticized these allegations.

> In the light of the heightened specificity requirements for Rule 8 in section 1983 cases, we look for definiteness in the averment of wrongful acts. These vague allegations, which are supported by no specific factual allegations against the Mayor, constitute no basis for a section 1983 cause of action. *Id.*

Not only did the court criticize the insufficiency of the plaintiff's factual allegations, it also took the opportunity to criticize the district court for failing to impose the heightened pleading standard. "We . . . stress that this heightened Rule 8 requirement -- as the law of the circuit -- must be applied by the district courts; and we had anticipated that it would be vigorously applied by the district court in this case." *Id.* at 1485. *See also Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (adopting a "heightened pleading standard" and finding "in order to survive a motion to dismiss, plaintiffs

must state in their complaint nonconclusory allegations setting forth evidence of unlawful intent") and *Branch v. Tunnell*, 14 F.3d 449, 450 (9th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 2704 (1994) (refusing to reconsider the application of the heightened pleading standard in light of *Leatherman*).

The Eighth Circuit's conclusion that a qualified immunity analysis can be performed in the absence of the heightened pleading standard is also contrary to an opinion from the District of Columbia Circuit.[5] In *Whitacre v. Davey*, 890 F.2d 1168 (D.C. Cir. 1989), that court imposed a heightened pleading standard, requiring nonconclusory allegations of fact "specific and concrete enough to enable defendants to prepare a response, and where appropriate, a motion for summary judgment based on qualified immunity." *Id.* at 1171. Upon application of the heightened pleading standard to a *Bivens*[6] age discrimination claim, the court found that the complaint was insufficiently plead despite the fact that it asserted a *prima facia* case. Therefore, the court affirmed the district court's grant of the motion to dismiss asserting qualified immunity.

As discussed above, many circuit courts have found that a circuit court, reviewing the denial of a motion to dismiss asserting qualified immunity, is required to apply a heightened pleading standard to its review of the complaint. The Eighth Circuit, despite the fact that it imposes the

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[5] The views of the District of Columbia Circuit concerning the heightened pleading standard now appear uncertain. *See* part B below, discussing the District of Columbia Circuit's recent decision in *Crawford-El v. Britton*, 93 F.3d 813 (D.C. Cir. 1996).

[6] *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

heightened pleading standard on its district courts,[7] refused to apply the standard to its *de novo* review of a motion to dismiss asserting qualified immunity. Only this Court can resolve these conflicts.

3. Appellate Court Jurisdiction to Impose the Heightened Pleading Standard. The Eighth Circuit held here that it lacked jurisdiction to enforce the heightened pleading standard upon its *de novo* review of a motion to dismiss asserting qualified immunity because the denial of a Rule 12(b)(6) motion to dismiss is not a final appealable order. App. at A-6. This Court has found that the denial of a motion to dismiss asserting qualified immunity is a final appealable order, *Behrens v. Pelletier*, ___ U.S. ___, 116 S.Ct. 834, 839 (1996), and that courts can review, on a qualified immunity appeal, "whether or not certain given facts show[] a violation of 'clearly established law.'" *Johnson*, 115 S.Ct. at 2155, citing *Mitchell*, 472 U.S. at 528.

The Eleventh Circuit, disagreeing with the Eighth Circuit, has found that it had jurisdiction to impose the heightened pleading standard as part of its review of a denial of a motion to dismiss asserting qualified immunity. The court found "[a]t this early stage in the proceedings, the Rule 12(b)(6) defense and the qualified immunity defense become *intertwined*" and then the court, "[g]uided by . . . the heightened specificity requirement of Rule 8 in section 1983 cases" proceeded to determine the adequacy of the plaintiff's allegations. *Olandeinde*, 963 F.2d at 1485, emphasis added. This Court appears to favor the "inextricably intertwined" test to identify those issues over which circuit courts enjoy jurisdiction when reviewing the denial of qualified immunity. *Swift v. Chambers County Com'n*, ___ U.S. ___, 115 S.Ct.

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[7] *Edgington v. Missouri Dep't of Corrections*, 52 F.3d 777, 779 (8th Cir. 1995).

1203, 1212 (1995).

The sufficiency of the facts contained in a complaint are inextricably intertwined with a ruling on a defendant's claim that a plaintiff has failed to state a claim as a result of qualified immunity. Such a conclusion is compelled because the qualified immunity analysis, to be performed at all, must evaluate specific facts to determine if reasonable officials would have known that their alleged conduct violated clearly established law. *Myers v. Morris,* 810 F.2d 1437, 1459, n. 16 (8th Cir. 1987). This is equally true when the qualified immunity analysis is performed at the motion to dismiss stage. "Upon assertion of a qualified immunity defense the plaintiff must put forward specific, non-conclusory factual allegations which establish malice, or face dismissal." *Siegert v. Gilley,* 500 U.S. 226, 236 (1991), Kennedy, J., concurring. *See also Anderson v. Creighton,* 483 U.S. 635, 640-41 (1987) (Court of Appeals' qualified immunity analysis was deficient because the court failed to consider the circumstances the government actor faced). The district court here specifically found that the allegations in the complaint were insufficient to determine whether petitioners were entitled to qualified immunity but failed to dismiss the complaint or require respondent to replead, finding that petitioners had been given "notice" of respondent's claim. App. at A-9. The Eighth Circuit also imposed only a notice pleading standard.

The Sixth, Ninth and Eleventh Circuit courts disagree with the conclusion of the Eighth Circuit that notice pleading is sufficient to withstand appellate review of the denial of a motion to dismiss asserting qualified immunity. None of these circuits has found an absence of jurisdiction to apply the heightened pleading standard when performing the qualified immunity review, and the Eleventh Circuit has specifically found to the contrary. The Eighth Circuit's conclusion, that it lacks jurisdiction to impose a heightened

pleading standard, is illogical in light of the circuit court's acknowledged obligation to conduct a *de novo* review of the motion to dismiss (App. at A-5) and its embrace of the heightened pleading standard. *Edgington*, 52 F.3d at 779.

B. Other circuit courts have reached inconsistent results as to the existence and possible application of a heightened pleading standard.

Other federal circuits have reached inconsistent results as to whether a heightened pleading standard exists and, if so, how and when to apply the standard.[8] For example, the Fourth Circuit interpreted this court's opinion in *Leatherman* "almost to suggest" that a heightened pleading standard was required. *Jordan by Jordan v. Jackson*, 15 F.3d 333, 339 n.5 (4th Cir. 1994). *See also Schultea v. Wood*, 47 F.3d 1427, 1435 (5th Cir. 1995) (en banc) (Jones, J., concurring) ("*Leatherman* more naturally implies that the Supreme Court might *require* the imposition of a heightened pleading standard in these cases - let alone *permit* one to be applied") (emphasis in original). Compare these conclusions with the conclusion of the Seventh Circuit: "As the Supreme Court recently made very clear [in *Leatherman*], there is no heightened pleading requirement for civil rights actions." *Baxter by Baxter v. Vigo County School Corp.*, 26 F.3d 728, 734 (7th Cir. 1994)[9].

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[8] *See* Blum, *Heightened Pleading: Is There Life After Leatherman*, 44 Cath. U.L. Rev. 59, 76-77 (Fall 1994), collecting cases at n.89.

[9] The Seventh Circuit did not explain how a qualified immunity analysis can be performed at the motion to dismiss stage in the absence of specific factual allegations, but did note that it is not compelled to accept "conclusory allegations concerning the legal effect of facts set out in the complaint." *Id.* at 730. A reader suspects that this rule will now

The existing inconsistencies are readily apparent when one reviews cases from the Fifth and District of Columbia Circuits. The Fifth Circuit has long been a leader in heightened pleading jurisprudence. Following this Court's decision in *Leatherman* one might have expected the Fifth Circuit to pull back from the application of the heightened pleading standard. At least initially it did not. *See Babb v. Dorman*, 33 F.3d 472, 475 n.5 (5th Cir. 1994) (noting, following *Leatherman*, that "[t]o survive a motion to dismiss in cases where the qualified immunity defense is raised, a plaintiff must state facts, which if proven, would defeat the defense"); *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 994 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 2555 (1995) (same).

Then in *Schultea*, it appeared the court was trying to reformulate its heightened pleading precedents. The court raised, but refused to resolve, the question left open in *Leatherman* concerning the application of a heightened pleading requirement (47 F.3d at 1432) and conceded that "avoiding qualified immunity is [not] an element of a claim." *Id.* at 1433. Nevertheless, the court stood by its "insistence that complaints plead more than conclusions, and that a plaintiff can, at the pleading stage, be required to engage the affirmative defense of qualified immunity when invoked." *Id.* at 1430. The court suggested that district courts have little choice but to require a plaintiff to file a "reply tailored to an answer pleading the defense of qualified immunity." *Id.* at 1434. The court additionally said that, prior to discovery, the plaintiff must support his claim "with sufficient precision to raise a genuine issue as to the illegality of defendant's conduct at the time of the alleged acts." *Id.* Four judges concurred in *Schultea*, to "defen[d] the continued vitality of

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be cited with increased frequency when qualified immunity is asserted in a motion to dismiss.

[the heightened pleading standard]." *Id.*

The concurring judges apparently worried for little reason. Subsequently, two panels of the Fifth Circuit have embraced the heightened pleading standard. *See Baker v. Putnal,* 75 F.3d 190, 195 (5th Cir. 1996) (*Schultea* "does not establish any new law with respect to the application of the heightened pleading standard"); *Morin v. Caire,* 77 F.3d 116, 120 (5th Cir. 1996) (reversing the denial of a motion to dismiss asserting qualified immunity, "[p]ublic officials are entitled to qualified immunity . . . unless it is shown by specific allegations that the officials violated clearly established law"). Hence, the Fifth Circuit apparently agrees with the Sixth, Ninth and Eleventh Circuits that notice pleading is insufficient to withstand a motion to dismiss once a government official asserts the defense of qualified immunity.

The Fifth Circuit's gyrations are a waltz compared to the District of Columbia Circuit's recent attempt to resolve the continuing applicability of the heightened pleading standard. It recently produced a 41 page opinion, including four concurring opinions, which revoked the use of the heightened pleading standard label but may have changed little else. *Crawford-El v. Britton,* 93 F.3d 813 (D.C. Cir. 1996)

In *Crawford-El* the court initially revoked its "requirement that plaintiff allege 'direct' evidence of unconstitutional motive." *Id.* at 815. More importantly here, the court rejected altogether the notion that the heightened pleading standard has anything to do with pleading requirements; labeling "heightened pleading" a "misnomer."

Id. at 823.[10] Nevertheless, the court reaffirmed its rule requiring a plaintiff to plead "nonconclusory allegations that are sufficiently precise to put defendants on notice of the nature of the claim and enable them to prepare a response and, where appropriate, a summary judgment motion on qualified immunity grounds." *Id.* at 825. This, of course, is the essence of the heightened pleading requirement, the pleading of specific facts allowing the court to evaluate a claim that the defendants did not violate clearly established law.

The apparent inconsistency of these two positions was continued in the concurring opinion of Judge Edwards who rejected the heightened pleading requirement (plaintiffs "are not obligated to meet any form of heightened pleading standard in their initial complaint" *Id.* at 847), but still required the court to determine, "once a defendant actually asserts the qualified immunity defense," whether plaintiff has a "sufficient factual basis to support allegations of unconstitutional animus and therefore overcome qualified immunity." *Id.* at 849. In short, it appears that the court rejected the "heightened pleading standard" in name only, as it still requires plaintiffs, in response to an assertion of qualified immunity, to plead facts or to have pled facts that are sufficient to enable the court to perform the fact-intensive qualified immunity analysis.

C. The conflicts and inconsistency concerning the existence and application of a heightened pleading standard warrant resolution by this court because qualified immunity is an important federal doctrine

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[10] *But see Lindsey v. Shalmy*, 29 F.3d 1382, 1385 (9th Cir. 1964) (application of heightened pleading standard appropriate at pleading, not summary judgment, stage).

and the issue concerns a matter that is frequently before the lower courts.

The case law from around the country provides ample evidence that there is absolutely no consistency in the manner that the circuits apply a heightened pleading standard, if they find one to exist at all. Given the frequency of civil rights suits[11] and the importance of this immunity doctrine to government officials who are frequently named as defendants based on their status without regard to their conduct, this inconsistency must be resolved. This Court has twice granted certiorari to address essentially the question presented here, but resolved those cases on different grounds. See questions presented in *Siegert*, 500 U.S. at 237 and *Kimberlin v. Quinlan*, 63 U.S.L.W. 3797 (U.S. May 9, 1995) (No. 93-2068). The question still requires resolution and this case presents an ideal avenue. It is a factually uncomplicated case, involving allegations that are hardly novel, where entitlement to qualified immunity was asserted in the motion to dismiss. There are no factual disputes. More to the point, there are almost no facts at all.

The complaint here rests on vague and conclusory actions that are simply insufficient to permit a conclusion that petitioners violated clearly established law. Hafley has brought a claim against the cabinet-level director and former director of the Missouri Department of Revenue, their immediate deputies and three additional petitioners without alleging a single fact in support of her claim that these defendants retaliated against her for complaining about instructions she received from her immediate supervisor.

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[11] The Judicial Conference has noted that increasing numbers of civil rights cases, particularly those brought by *pro se* litigants, have burdened the federal courts. *See* Judicial Conference of the United States, *Long Range Plan for the Federal Courts*, p. 63 (1995).

These petitioners are not mentioned by name in the complaint's sparse allegations. In light of the insufficiency of the facts pled, no reviewing court can reasonably evaluate the conduct of these petitioners and conclude that it violated clearly established law.

Petitioners James and Powell are alleged to have alternatively instructed respondent to hide a file and not speak of it or to have instructed respondent to avoid the matter and follow her supervisor's instructions. The inability to measure these allegations against clearly established law becomes apparent when one considers that there is no allegation that James was under any obligation to disclose the existence of the file and that certain information maintained by the Department of Revenue is considered confidential by law. Specifically, Mo. Rev. Stat. § 32.057.1 (1994), provides that any person wrongfully disclosing confidential Department of Revenue information is guilty of a class D felony. Respondent has not described the contents of the file. Surely James is permitted to protect confidential information from improper disclosure. Finally, the law does not clearly protect respondent's allegation of illegality made against her supervisor to other Department employees. *See Henry v. Dep't of Navy,* 902 F.2d 949, 953 (Fed. Cir. 1990) (no First Amendment violation occurred where an employee was discharged for refusal to perform legitimately assigned work and for making false and unfounded accusations against employer).

Petitioners Lamb and Reuter allegedly were advised of the supposedly illegal instructions of James and Powell, hardly a clearly established constitutional wrong, and to have engaged with all the other petitioners in a long list of retaliatory acts not specifically linked to any of them. As the district court here conceded, respondent's allegations are insufficient to weigh petitioners' entitlement to qualified

immunity. App. at A-9. This complaint is the kind of "inchoate, generalized form of pleading that fails to convey to the district court the information it needs to determine whether a defendant is entitled to qualified immunity." *Veney*, 70 F.3d at 922. Respondent failed to disclose the missing information at the pleading stage and has consistently refused to do so, despite a motion to dismiss pinpointing the deficiencies, a motion for reconsideration advising that petitioners were considering an appeal, and an appeal that petitioners offered in writing to dismiss if respondent would present an amended complaint. Hence, it appears likely that respondent is engaged in "artful pleading" of the type federal courts are supposed to guard against, *Butz v. Economou*, 438 U.S. 478, 507 (1978), for the very purpose of defeating petitioners' qualified immunity.

The allegations contained in respondent's complaint would not have survived petitioners' assertion of qualified immunity in the Sixth Circuit. *Veney*, 70 F.3d at 922, *Guercio*, 911 F.2d at 1187-89. As the Sixth Circuit recognizes, no true *Pickering* balancing test can be performed absent the type of specific factual allegations required in the Sixth Circuit. If qualified immunity is to serve its important federal objectives, its application cannot be determined by the current geographic lottery.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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